



Generally Speaking

COMINGS and GOINGS

Welcome to:

Parker Nation, CPA, who rejoined the RAPA Section as a Public Advocate Utility Analyst I (financial analyst) after a two-year stint in the private sector.

Paralegal **Jalean Mallet**, to the Palmer Child Protection Section; **Carolyn Doropan**, Juneau Civil Division Case Manager; Paralegal **Mary Lou Canney** to the Bethel DAO. Mary Lou comes from the Office of Children's

Services in Bethel, where she worked for the last several years.

The Palmer DAO said goodbye to **ADA Jon-Marc Petersen** who moved to private practice in Wasilla.

The Fairbanks DAO bid farewell to **ADA Jason Gazewood** but welcomed **ADA Dave Carlson**. ADA Gazewood left the office to pursue private practice, and ADA Carlson comes to the offices from private practice. The office also said goodbye to **ADA Matt Christian**, who took a position as a magistrate in Kenai.

ADA Will Walton left the Kenai DAO to pursue private practice. Replacing him is **ADA Gary Poorman**. For the last year and a half, ADA Poorman was a municipal prosecutor in Anchorage. He also has six years of experience as a prosecutor in Ohio. The office also said goodbye to Administrative Assistant **Ricki Grundy**, who retired, but welcomed **Mellinee Davis**, who stepped into the position. Mellinee comes from the Alaska State Troopers where she spent seven years working dispatch.

The Labor and State Affairs Section is delighted to announce the October 18 birth of **Siobhan Witty** to **AAG Rachel Witty**. Mother and baby are doing well. The section is also pleased to welcome **Letitia Alvarez**, who will be working in the Anchorage offices as the newest LOA. The Juneau offices also welcomed **AAG Jessica Srader**, who will be handling employment and retirement and benefits matters.

The Juneau Legislation and Regulations Section welcomed **AAG Mike Ford**. AAG Ford is the legislative liaison for the Civil Division and has over 20 years of legislative experience, including serving as legal counsel in the legal division of the Legislative Affairs Agency. Prior to coming to the department, he was the state legislative director for the Alaska Native Health Board.

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KUDOS

Congratulations to:

Human Services **Section Chief Stacie Kraly**, who received the 2007 Attorney General's Leadership Award at the Civil Division Supervisor's Retreat in September.

Fairbanks Child Protection Section **AAG Robin Fowler** and Bethel **ADA Christian Carpeneti**, who both passed the July 2007 bar exam. ADA Carpeneti was weathered-in at the village of Chevak when he learned the good news.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in OCS petitions:

OCS investigated a report of harm that parents who are developmentally delayed were not properly taking care of their newborn infant, putting the infant at risk of harm. The mother has had her parental rights to another child terminated in the past. The mother also has a history of substance abuse. OCS assumed emergency custody.

OCS filed a petition to assume custody of two children when their parents were unable to maintain sobriety and refrain from domestic violence. The OCS had been working with the family, offering substance abuse treatment and counseling since March 2007. Those services were unsuccessful. The court awarded custody to OCS and the children are in foster care.

In Kenai, OCS assumed emergency custody of two children after it received reports of medical neglect and sexual abuse. Child pornography was reported to be found in the home. Additionally, one child was in need of specialized

medical care and had been for some time. But the parents never got the child the needed care. OCS assumed emergency custody.

In another case in the Kenai area, a mother called OCS and indicated she was unwilling to provide care for her children. She was actively abusing substances and wanted to leave the state with her PFD money. OCS had been working with this mother for several months to stabilize the home and put appropriate services in place. Those efforts were unsuccessful. The father is deceased; OCS assumed emergency custody.

OCS assumed emergency custody of a newborn baby due to the risk of harm presented by the mother. The mother has three other children currently in state's custody for physical abuse and substance abuse. She has not participated in any services that would allow her to be reunified with her children. The father has also not complied with recommended services and continues to present a risk to the children.

OCS responded to a report that a child had bruising on his face and legs as a result of a beating from his father. Upon investigation, it was found the child did have bruising and was afraid to go home. The father was arrested and charged with family violence. The mother has prior child abuse allegations as well. OCS assumed emergency custody.

OCS assumed emergency custody of an infant whose mother is 13-years-old with an alcohol problem. There are also concerns the infant may suffer from fetal alcohol syndrome.

The Anchorage Police Department responded to a call of a child alone at a local store. The police contacted OCS; OCS assumed emergency custody and the child was placed at a shelter. The child's regular caregiver has a history of substance abuse, the mother's whereabouts are unknown and the father is incarcerated.

The department received a report of concern regarding a mother's ability to care for her

newborn child. The mother has been diagnosed with schizophrenia, bipolar disorder, and fetal alcohol syndrome. She is not currently on any medication. The mother also admitted to drug use. The father did not cooperate in making a safety plan so that the child could be placed with him. OCS assumed emergency custody.

OCS assumed emergency custody of a 1-year-old girl when she presented at the hospital with bruises and swelling on her face and forehead. The mother also presented with extensive injuries consistent with a domestic violence incident. The mother indicated that she planned to remain with the perpetrator.

OCS investigated a report that a mother had used substances and was breastfeeding her two infant girls. The mother was asked to submit to a urine analysis to confirm sobriety. She was positive for cocaine. Both infant girls were tested and found to be positive for cocaine. In addition, one infant may have additional medical issues connected with failure to thrive. OCS assumed emergency custody.

A nine-year-old girl reported that she had been sexually abused by her father. She also reported substance abuse in the home. The family has extensive history with OCS and OCS assumed emergency custody.

OCS assumed custody of two teenage boys after they refused to return home. They reported extensive substance abuse and domestic violence issues and expressed fear of their father. OCS had been offering services for these issues in the past year, but those efforts were unsuccessful.

Numerous children across the state were taken into custody as a result of serious risk of harm as a result of their parents' substance abuse and domestic violence.

Activities

Most of the section's Anchorage and Palmer AAGs were able to attend the 2007 South Central ICWA Forum: *Sharing Perspectives for the Benefit of Native Children*. The conference was in Anchorage, attended by representatives of a number of Alaska Native tribes and community child protection agencies, as well as representatives from OPA and the PDA. AAGs who attended reported that the conference was informative and the information will be of benefit to them in performing their jobs.

Commercial and Fair Business

State Requires Divestiture in School Bus Merger

Working with the Federal Department of Justice and 11 other state attorney general offices, Alaska required First Student to divest its bus contract with the Anchorage School District before approving a merger with Laidlaw. First Student and Laidlaw announced their intent to merge in June. They are the only two companies providing student bus transportation services in the four main school districts in Alaska (Anchorage, Fairbanks, Mat-Su, and Kenai), with First Student holding the Anchorage contract, and Laidlaw the other three. After a two month investigation, the Alaska AG determined that a divestiture of the Anchorage contract to a third party would resolve competitive concerns. After approval by the Anchorage School Board, the contract was assigned to Forsythe Transportation Inc. Forsythe has extensive experience in the student transportation market.

Consumer Protection Outreach

October was a month of focusing on consumer education in outlying areas of Alaska. Consumer Protection AAG, Julia Coster, participated as a presenter at consumer education classes (ID Theft and Fundamentals of Fraud) in educational workshops sponsored by AARP and the Division of Banking in Barrow and Bethel. AAG Coster

was also a presenter at the Sitka Native Arts Summit sponsored by the Alaska State Council on the Arts. She provided information on counterfeit Alaska Native art including prevention, protection and enforcement.

Alaska Supreme Court Affirms Board Reliance on "Set Aside" Criminal Convictions

In October, the Alaska Supreme Court issued a decision in *State v. Joy Platt*. Platt applied for certification as a nurse's aide. Platt had been convicted of two counts of felony forgery and one count of felony theft for forging and cashing 24 checks totaling \$10,000. The checks belonged to members of Platt's church who had let her stay with them because she was homeless. While still on probation for these felonies, Platt was convicted of shoplifting. The Board of Nursing concluded that these convictions were "substantially related to the qualifications, functions, or duties of a certified nurse aide" and denied Platt's application for certification.

Platt received a suspended imposition of sentence on the felony crimes, and those convictions were later "set aside" by the court. Upon appeal, Superior Court Judge Huguelet ruled that the board could not consider the set aside convictions because Platt was no longer "convicted" of those crimes. The Alaska Supreme Court agreed with the state's position that, even though the three felony convictions had been set aside, Platt had still been convicted of them and the board was entitled to consider that conduct when reviewing the certification application. The Court found the board properly exercised its discretion, and there was substantial evidence to support the board's decision. The Court emphasized the board's duty to protect the public, especially ill, elderly, disabled, and vulnerable patients. (Former) AAG Dave Brower handled the case.

Medical Board Denies Reinstatement of Anchorage Physician

On October 25, the State Medical Board adopted the proposed decision of Administrative Law Judge ("ALJ") Chris Kennedy and affirmed its prior denial of former Anchorage physician Mark Beirne's application for reinstatement of his previously surrendered license. Beirne, who surrendered his Alaska medical license in 1995 due to his abuse of alcohol and who is currently living in Georgia, applied for a new license in September 2005. The board considered the application at its January and June 2006 meetings but ultimately denied it. Beirne requested a hearing which took place before ALJ Kennedy on February 22, 2007. Beirne and his attorney participated by telephone from Georgia. The Division of Corporations, Business and Professional Licensing ("Division") defended the board's denial at the hearing. The ALJ issued his proposed decision on August 22, 2007.

The ALJ relied on 12 AAC 40.965(a)(1)(C), which provides that a voluntarily surrendered license will be reinstated if the board determines that (among other criteria) the applicant has committed no grounds for imposition of disciplinary sanctions under AS 08.64.326. The ALJ interpreted this regulation to mean that Beirne's license could not be restored unless the board determined that, since his surrender, Beirne had committed no act that would be grounds for disciplinary sanctions. The ALJ concluded that the board could not make that determination in this case because, after his surrender, Beirne practiced medicine in Alaska without a license (as evidenced by a cease and desist order issued by the division in 1998), which is considered unprofessional conduct under AS 08.64.326(a)(9). Therefore, despite the fact that Beirne had been sober for more than five years, the ALJ recommended that his application be denied. AAG Robert Auth represented the division in this proceeding.

State Gets Summary Judgment in Long Pending Sea Hawk Case

In 1997, Sea Hawk Seafoods sued the state claiming the actions taken by the state to protect its interests in Valdez Fisheries Development Association (the state's borrower to the tune of \$7 million) were a fraudulent conveyance that prevented Sea Hawk from being able to collect its \$2.2 million judgment against VFDA. The state had concluded its loans were in jeopardy, called the loans in default and demanded VFDA pay the state all of its cash. The state received payments from VFDA and other parties who owed VFDA money totaling \$1.7 million. In order to further protect its interests and to ensure repayment of the remaining \$5+ million owed by VFDA, the state approved an operating loan to VFDA in the amount of \$1.062 million. After ten years of litigation, which included a chapter 11 bankruptcy, two appeals to the U.S. District Court, one appeal to the 9th Circuit, and one appeal to the Alaska Supreme Court, the superior court (Judge Tan) has ruled that Sea Hawk's fraudulent conveyance claims are barred by the state's sovereign immunity under AS 09.50.250(3). It is expected that Sea Hawk will appeal this decision to the Alaska Supreme Court.

Superior Court Affirms RCA Decision Giving Broad Deference to the RCA

General Communications Corp., Inc. ("GCI") appealed to the superior court the Regulatory Commission of Alaska's ("RCA") order granting Matanuska Telephone Association, Inc.'s ("MTA") petition for the suspension or modification of duties imposed on MTA by Section 251 (c) of the Telecommunications Act of 1996.

This section of the act, among other things, requires that a local exchange carrier lease components of its network to competitor telecommunication carriers. However, the act also provides for a "rural exemption" from section 251(c) to shield small rural exchange

carriers from unbridled competition. MTA enjoyed this exemption. The exemption, however, can be forfeited when the rural carrier opts to provide video programming to its customers, unless the rural carrier can demonstrate that continued exemption is in the public interest based on the undue economic burden that would be imposed on the rural carrier by Section 251(c) competition. In 2003, MTA elected to provide video services to its customers. GCI then sought access to MTA unbundled network elements under Section 251(c) and MTA petitioned the RCA for a three year suspension from the requirements of Section 251(c). The RCA granted the suspension giving rise to the appeal.

GCI alleged on appeal that the RCA's decision to grant MTA's petition for suspension was legally flawed on both procedural and substantive grounds. In a 24-page decision, Superior Court Judge John Suddock denied GCI's appeal and affirmed the RCA's order, finding that GCI was accorded due process; RCA's reliance on challenged assumptions underlying the MTA's economic model was supported by substantial evidence; the RCA's order granting MTA's suspension petition was within RCA's particularized expertise; and the RCA's decisions were reasonable. In reaching its decision, the court gave broad deference to the RCA, recognizing the commission as more qualified than it to gauge the plausibility of various technical issues considered by the RCA.

The court also described the RCA's order as a "highly discursive, thoughtful treatment of a complex matter squarely within the RCA's particularized expertise" and an "enormously conscientious opinion and order." AAG Christine Moore handled this appeal with assistance from AAG Ed Sniffen and (former) AAG Rob Royce.

Human Services

Litigation Update

The section was very busy with litigation this month.

Section Chief Stacie Kraly took over a class action lawsuit, *Heitz v. State*, from AAG Diane Foster and argued a motion for summary judgment before Judge Rindner. The determinative issue in this matter is whether foster care payments constitute a protected property interest of foster parents and are therefore subject to all due process considerations. The court has asked for supplemental briefing, which will be completed by the end of this month. Section Chief Kraly also filed a motion to dismiss on mootness grounds and an opposition to a motion to amend the complaint in the *Olsen v. Palin, et al.* matter. This is a case brought by ALSC related to alleged IDEA and Medicaid violations.

The section received decisions in three administrative hearings on Certificate of Need matters. In *ITMO Kobuk Ventures, Fairbanks Memorial and Advance Medical*, after ten long months of litigation and motion practice, the commissioner ruled that Kobuk should receive two surgery suites in the Fairbanks area. In *ITMO South Anchorage Joint Venture*, after a year of litigation, the commissioner upheld her original decision that no surgery suites be awarded in Anchorage. This matter has already been appealed. The section also received a favorable ruling from the OAH on cross motions for summary judgment in the *Imaging Associates of Providence* matter, which relates to the issue of what constitutes an independent diagnostic testing facility. This decision is now before the commissioner and the section will be submitting a proposal for action before November 11, 2007.

Section Chief Kraly filed a motion for summary judgment in the *Mat-Su Valley Hospital v. APC and Commissioner Jackson* related to the

determination that APC did not need a Certificate of Need because they had not exceeded the statutory threshold to build their surgery center.

AAG Libby Bakalar won a motion for attorneys' fees in the *Huffman v. State, Kenai School District*, successfully arguing the parameters of Civil Rule 82 and *Nunapatchuk*.

AAG Bakalar filed a motion to dismiss in *Smart v. State*, a class action complaint filed by the Northern Justice Project related to independent Medicaid audits under AS 47.05.200.

AAG Rebecca Polizzotto filed briefs in two superior court appeals (*Calvert* and *Mullenbruch*) of Medicaid audit findings and has two more appeals in progress.

AAGs Robin Fowler and Nevhiz Calik filed a motion to dismiss on issue preclusion grounds and an opposition to a motion for temporary restraining order in *Radebaugh v. State, et al.* The issue in this matter is identical to one raised by the Northern Justice Project in the *Baker* matter, which the section prevailed on before another superior court judge and which is in part on appeal to the supreme court.

AAG Beth Russo filed her appeal in the *Bill Bigley* matter which relates to the title 47-commitment process and the definition of grave disability.

Medicaid

Subrogation/Liens

During the month of October, the Medicaid lien/subrogation unit has collected a total of \$163,651.15 because of 28 case resolutions. For calendar year 2007 the total collected to date is \$1,006,138.67. At the present time, the unit has a caseload of 706 open matters and has resolved 1006 matters since 2005.

Licensing

AAG Polizzotto had two successful mediations this past month before the OAH in Anchorage. Along with responding to numerous requests for legal services, AAG Polizzotto is also preparing another training for foster care licensing workers.

Medicaid Audits

AAG Polizzotto settled the South Central Counseling Medicaid and Geneva Woods provider appeal. All documents have been filed with the court to dismiss the Geneva Woods appeal and they have made a \$40,000 payment. Currently AAG Polizzotto has eight cases on appeal to superior court on Medicaid audit appeals. Briefs have been filed in three of those cases and the section is awaiting decisions in those matters.

APS/API

AAG Russo successfully litigated a contested conservatorship hearing in Bethel. She also conducted two trainings this month. One was for the Anchorage Police Department and their CIT officers on the definition of grave disability for purposes of seeking an ex parte order for evaluation and commitment under AS 37.30. The other training was for other attorneys. AAG Russo was a guest speaker at the Health Law section of the Alaska Bar, where she spoke about the civil commitment process.

AAG Bakalar is working with the Division of Public Assistance on its "Notice Improvement Project." On October 25, she presented on the topic of due process at DPA's Coastal Regional Manager's conference in Kenai, which was well received.

Public Health

AAG Bakalar completed the final report for the ASTHO pandemic flu legal preparedness study and submitted it to DPH and the study's sponsors. Section Chief Kraly also continues to help other client agencies (Vital Stats, EMS,

Public Health Nursing) with aid-to-agency type questions as they arise.

Regulations

AAG Kelly Henriksen was very helpful this past month working on two emergency regulations projects – Senior Care and a project related to the Licensing Program (criminal background checks). She continues to work on the omnibus Medicaid coverage regulations.

Section Chief Kraly attended a conference on Medicaid and mental illness issues in Scottsdale, AZ. It was very informative and helpful in dealing with issues that are coming to the department as a result of the Virginia Tech tragedy last spring (the sharing of information between mental health providers, educational systems and the court system) and what the state's obligations are regarding reporting of commitments to the federal government for gun sale background checks.

Labor and State Affairs

Court System

On October 5, attorney James Bopp moved for rehearing or rehearing en banc of the Ninth Circuit Court of Appeals decision in *Alaska Right to Life & Miller v. Feldman* (Sept. 21, 2007), reversing the district court's decision that a judicial canon violated the First Amendment.

The Ninth Circuit had held that plaintiffs' lacked a justiciable case or controversy: the constitutional challenge should not have been entertained because the facts were not adequately developed. Right to Life filed the suit initially to remove barriers it perceived in the judicial canons to judges' responding to pre-election surveys on subjects of interest to the organization. The basis maintained for the motion for rehearing is a claim that the decision conflicts with Ninth Circuit precedent and with decisions in other circuits. No response can be filed to a motion for

rehearing unless one is invited. Section Chief Jan DeYoung represents the members of the Judicial Conduct Commission.

Education

On October 12, Federal District Court Judge Beistline granted the state's motion to dismiss *Katelyn R. v. Department of Education and Early Development*. The claimants sought special transportation services for special needs students that the state had no responsibility or authority to provide. The court relied on the briefing by AAG Neil Slotnick and the administrative decision of an independent hearing officer.

Elections

On October 12, Judge Torrisi issued summary judgment in *Holman v. Parnell*, concluding that the so-called clean water initiative proposal, which would adopt stringent water quality requirements effectively prohibiting large-scale metallic mining, did not violate the state constitution's prohibition on the use of the initiative to make or repeal an appropriation. On advice from this department, the Lieutenant Governor had denied certification of the initiative (which would permit the initiative proposal to be circulated for signatures) on the basis that its effect on mining violated the prohibition by invading the legislature's retained control over the allocation of state assets. Judge Torrisi acknowledged that the effect of the initiative, if it became law, would be to bar new large-scale metallic mineral mines but concluded that barring one use of a state asset was not equal to making an appropriation. This matter is being handled by AAG Mike Barnhill.

Employment

On October 1, the Ninth Circuit Court of Appeals granted the state's motion for a stay of administrative proceedings in *Ward/Jones v. State*. The case is on appeal from the Equal Employment Opportunity Commission on the issue of sovereign immunity. EEOC had scheduled

proceedings in the matter despite the fact that the state's claim of immunity was under review in the Ninth Circuit. The stay extends to the completion of all proceedings in the appeal, which AAG Richard Postma argued before the court on August 7, 2007. AAG Brenda Page has handled the case since AAG Postma's departure in August.

On October 26, AAG Joan Wilkerson filed the appellee's brief in the Alaska Supreme Court in *Crowley v. State*. This case is a former state social worker's appeal from a summary judgment denying her wrongful termination claim.

Occupational Safety and Health

AAG Larry McKinstry settled two OSHA complaints this month. The first is against Nabors Drilling and concerns a highly publicized incident involving an employee at a North Slope drilling site. The employee, who was 19 and who had been on the job only three months, fell through an unguarded opening into an auger. Another employee was working on the rig attempting to unfreeze a horizontal auger that operated to push the drilling mud out of the well and into a tank for re-use. The other employee a) failed to de-activate the auger while he sprayed it with a steam hose, b) removed the grating that covered the auger and c) failed to warn his co-worker who was working in another adjoining room. During this process, the co-worker walked through the door and into the open floor area where the auger was operating.

As a result, the co-worker lost the bottom half of his left leg and his right leg was severely twisted and broken in a number of places. Nabors accepted two serious violations of the safety regulations. One for removing the guard (grating) and a second for violating the general duty to provide a safe workplace by failing to implement adequate controls to protect the workers. Nabors will pay a fine of \$12,600 instead of the original \$18,900.

The second action concerns Teck-Pogo, which resulted from a referral to Alaska Occupational Safety and Health by the federal Mine Safety and Health Administration. The Pogo mine, near Delta Junction, has a medical clinic/first aid room that did not comply with the standards protecting employees from blood borne pathogens. MSHA does not have regulations or standards that apply. Teck-Pogo claimed that MSHA had jurisdiction, but based upon a long-standing memorandum of agreement between federal MSHA and OSHA, OSHA had jurisdiction over medical, food service, maintenance, housing, etc., of employees on the mine site. Only true mining and milling operations are governed by MSHA. The settlement involved the consolidation of the violations to a single serious violation and a 40 percent reduction in the penalty from \$2,500 to \$1,500.

Public Offices Commission

On October 10, the state filed its opposition to two appeals that former state Senator Ben Stevens filed in superior court from two decisions by APOC concerning violations of the legislative financial disclosure law. In one appeal, being handled by AAG Mags Paton-Walsh, the issue is whether the senator should have disclosed income he earned as a member of a corporate board during the reporting year but which he deferred. Despite an unqualified right to the income in the reporting year, he argues that he did not receive it then and was therefore not required to report it.

The second appeal involved the reporting of clients of a limited liability company (LLC). APOC determined that an LLC should be reported as required for a partnership and professional corporation, whose clients must be reported, rather than as required for a corporation. A corporation's clients are disclosed only if the official and family members own over 50 percent of the corporation. Although the law requires all income to be reported, it did not specify how income from an LLC should be reported at the time that the senator filed. In

his appeal, Senator Stevens claims in the alternative that he was not required to report the income at all or that he should only have to report the LLC as the source of income but not its clients. Section Chief Jan DeYoung is representing the commission in the second appeal.

Retirement and Benefits

AAG Gina Ragle filed the appellee's brief with the Alaska Supreme Court in *Alford v. State* on September 27, 2007. The case is an appeal from a decision affirming the state's computation of the retirement benefit of PERS members who were employed before 1977, took early retirement, were reemployed, and later took a second retirement. The dispute is over the calculation of benefits. The benefits were originally computed by reinstating the benefits for the first period of employment and adding a separate benefit for the period of reemployment.

In accordance with advice of the section, the administrator recomputed the benefits under the provisions of the statute in effect before 1977, which provided for calculation of benefits upon rereirement by a single calculation based on the entire credited service and the applicable high average monthly compensation. For individuals who originally took early retirement, the administrator applied the provisions of the 1977 statute, reducing the new retirement benefit by the actuarial equivalent of the benefits that were received before reemployment.

The retirees object to this reduction. However, the retirees' calculation is the result of cobbling together provisions in effect at different times to obtain a benefit that the system never permitted. To obtain the benefit of an earlier system (on the basis of the constitution's protection against the diminishment of vested rights to retirement benefits), a retiree must accept the entire system.

Workers' Compensation Appeals Commission

AAG Krista Stearns filed the appellee's brief in *Barrington v. Alaska Communication Systems* with the Alaska Supreme Court on behalf of the commission. The case concerns the standard of review to be applied to Alaska Workers' Compensation Appeals Commission decisions. The commission's position is that its decision is the final administrative decision, and the Alaska Supreme Court reviews its decision, rather than the decision of the Workers' Compensation Board.

Legislation and Regulations

During October, the Legislation and Regulations Section spent a busy month preparing for and providing legal assistance to the second special session of the Alaska State Legislature. The second special session convened October 18.

The section also edited and legally approved for filing the following regulations projects: 1. Board of Game (taking and use of game in the Southeast Region: Mendenhall Wetlands State Game Refuge - waterfowl; statewide provision - Tier II permit transfer; emergency regulations on taking of small game in Skilak Loop Wildlife Management Area); 2. State Board of Education and Early Development (statewide assessment program for students with disabilities and participation guidelines for Alaska students in state assessments limited English proficient and special education); 3. Alaska Commission on Postsecondary Education (authorization for postsecondary institutions); 4. Big Game Commercial Services Board (licensure requirements, re-examination of registered guide-outfitters, examination for game management unit certification, hunt records, guide use area boundaries, transportation activity reports, and ethics standards); 5. Department of Commerce, Community, and Economic Development (emergency regulations on Southeast Alaska salmon marketing matching grant program; emergency regulations on Southeast Alaska

targeted fisheries assistance matching grant program; emergency regulations on community energy assistance grant program); 6. Commercial Fisheries Entry Commission (fees, poverty guidelines, and application for immediate fishing); and 7. Department of Environmental Conservation (seafood processing and inspection; Alaska Pollutant Discharge Elimination System; Drinking Water Revolving Loan Fund; and cleanup of illegal drug manufacturing sites).

Natural Resources

May v. State

On October 12, the Supreme Court affirmed the Commercial Fisheries Entry Commission (CFEC) final decision that Bert May was ineligible to apply for a permit in the Southeast herring purse seine fishery and affirmed the superior court's award of attorney's fees. The Court held that the CFEC properly denied May's application for a limited entry permit because he did not participate in the geographically-defined fishery in the years preceding his application. The Court specifically held that May is not eligible to apply for a permit based on fishing in Annette Island Reserve (Metlakatla Indian Reservation) waters.

The Court noted that "rather than argue that May was eligible to apply for a permit and receive participation points under the applicable regulations, May argues through a variety of legal theories that the commission should grant him an entry permit because it (erroneously) gave participation points to another applicant for Annette Island Reserve fishing activity" in the *Leask* decision. The Court then held that "because the doctrines that May relied upon, including collateral estoppel, stare decisis, and due process, do not require that we perpetuate an erroneous decision in clear contravention of the applicable statutes and regulations, we affirm the CFEC final decision."

The Court also held that the different treatment of May and Leask does not violate May's right to

equal protection, nor his right to be free from “unjust discrimination.” Reaffirming *Brandal v. State, CFEC*, the Court also found that May’s procedural due process rights were not violated at any time throughout the proceedings, or due to the delay in adjudication, because May received interim use permits granting him the windfall of twenty years of access to a fishery in which he was not entitled to fish. AAG Vanessa Lamantia represented the state in this case.

Eastwood v. State, Commercial Fisheries Entry Commission

On September 28, 2007, Judge Hopwood issued a decision in favor of the CFEC, affirming the commission’s decision in all respects. The court held that: the commission did not err by denying Eastwood skipper participation points for the 1982 Northern Southeast Inside sablefish season; the commission did not err by holding that the problems Eastwood experienced with his hydraulic system did not qualify as an extraordinary circumstance; the commission did not err by holding that Eastwood could not reasonably have claimed skipper participation points for the 1982 NSEI sablefish season but for the problem with his reduction gear; and a remand of the case to the commission is not appropriate. AAG Vanessa Lamantia represents the state in this case.

Reddekopp v. Commercial Fisheries Entry Commission

On October 3 Judge Collins affirmed the decision of the Commercial Fisheries Entry Commission, (“CFEC”) denying an entry permit to the Estate of Stanley Reddekopp for the Northern Southeast Inside Sablefish Fishery. Reddekopp failed to participate in the fishery in the qualifying years of 1982–1984, but claimed his non-participation was due to extraordinary circumstances. Under CFEC regulations, the commissioners may award points for participation in a given year if the fisher was in fact

prevented from fishing that year due to certain qualifying circumstances.

In this case, Reddekopp damaged his vessel when he ran it aground in 1982. He claimed that, but for this extraordinary circumstance of losing his vessel, he would have fished for sablefish in 1983 and 1984. The court upheld the CFEC’s decision that Reddekopp failed to prove this claim as the record contained substantial evidence that Reddekopp made an economic decision to follow other pursuits. The state has entered into a stipulation waiving its right to attorney fees in this case in exchange for Reddekopp’s waiving further appeal rights. AAG Tom Lenhart represented the CFEC in this matter.

Norval Nelson, Sr. v. State, Commercial Fisheries Entry Commission

On October 9, AAG John Baker filed the state’s brief in the Alaska Supreme Court in *Norval Nelson, Sr. v. State, Commercial Fisheries Entry Commission*. In this appeal from the denial of a limited entry permit for the Northern Southeast Inside sablefish (black cod) long line fishery, the appellant claims that his failure to hold the necessary licenses during qualifying years was the result of “misadvice” by CFEC staff, and that he was prevented from participating sufficiently in the fishery due to “extraordinary circumstances.”

Winter Board of Fisheries Regulatory Cycle Started

The Board of Fisheries has started its 2007–2008 regulatory cycle which involves a number of regulatory meetings requiring Department of Law attendance and advice on regulatory proposals. The 2007–2008 cycle involves 391 normally scheduled regulatory proposals and 33 days of scheduled meetings. On October 9 and 10, Senior AAG Lance Nelson and AAG Steven Daugherty, who will split coverage of regulatory meetings, attended a work session of the Alaska Board of Fisheries in Anchorage and provided advice on a variety of agenda change requests, petitions, and related issues.

Joint Boards of Fisheries and Game Meeting

Senior AAGs Lance Nelson and Kevin Saxby attended the October 5-8 meeting of the Joint Boards of Fisheries and Game. The joint boards made changes to regulations affecting fish and game advisory committees around the state, and considered, but did not adopt, proposals to change the regulations defining non-subsistence areas.

Coastwide Salmon Issues

AAG Anne Nelson assisted the Alaska Department of Fish & Game (ADF&G) in filing a complaint before the Federal Energy Regulatory Commission regarding Grant County PUD #2's planned experimental flow program from the Priest Rapids Dam project in Washington. The Chinook salmon stock that spawns below the dam is a far north migrating stock that comprises a significant part of the southeast Alaska Chinook troll fishery, and also is a driver stock for fishery management decisions made under the Pacific Salmon Treaty between the United States and Canada. The Pacific Salmon Treaty expires at the end of 2008, and negotiations for new treaty provisions are underway.

The Alaska Deputy Commissioner of Fish and Game for Fisheries sits on the Pacific Salmon Commission, which was established by the treaty and manages treaty fishery stocks. Grant PUD #2's planned operations for the 2007 spawning season were a variation of experimental operations during the 2005 and 2006 spawning seasons that resulted in excessive dewatering of redds (salmon egg nests) as well increased juvenile stranding and mortality. Additionally, Grant PUD #2's planned operations did not comply with a prior settlement agreement that had been incorporated into their FERC operating license.

Based on the complaints filed by several organizations, including ADF&G, Grant PUD #2 announced this week that they will adhere to the

operating requirements of the prior settlement agreement and implement a program proven to protect redds and decrease juvenile stranding and mortality.

Phase II of Federal Reserved Water Rights Case Commences

On October 12, the opening briefs of the state and Katie John plaintiffs were filed in phase II (which waters) of the consolidated Federal Reserved Water Rights litigation (*Katie John v. U.S.*) pending in the U. S. District Court. AAGs Mike Sewright and Steven Daugherty, in cooperation with the Alaska Department of Fish and Game, and Department of Natural Resources, substantially assisted outside counsel, Bill Horn, with developing the state's arguments and supporting materials. The next phase of the briefing, filing of oppositions, will be due in December.

Another Round of Polar Bear Comments Filed

On October 22, the Governor's Office filed state comments on nine new reports on climate change and polar bear modeling released by the United States Geological Survey in late September in support of the Fish and Wildlife Service proposal to list the polar bear as threatened under the Endangered Species Act. AAG Steven Daugherty assisted the Alaska Department of Fish & Game, Department of Natural Resources and Department of Environmental Conservation with comment development. The state pointed out a number of problems with the hastily prepared USGS reports and with the continued attempt to rely on uncertain climate change modeling, pushed beyond its current maximum range of reliability, which is limited to about a decade, to make projections 45 to 100 years into the future.

These errors were amplified by using climate modeling outputs as inputs into equally uncertain ice models, and in turn biological models. While the state recognizes that climate change and a recent warming trend in portions of the Arctic is occurring, the causes, mechanisms, and

effects are much more diverse and complex than recognized by the Fish and Wildlife Service or the USGS.

Despite the fact that polar bears have survived prior warming periods greater than the current one, the listing proposal and the USGS reports fail to consider polar bear adaptability to changing climate. The state maintains that it would be premature to list the polar bear as threatened at this time because the legal standard for listing as threatened – a determination that the species is likely to become endangered within the foreseeable future – has not been met.

Oil, Gas, and Mining

ACES Bill

AAG Ethan Falatko assisted the Department of Revenue with the development of Alaska's Clear and Equitable Share (ACES) legislation. The legislation is the focus of the second special session this year which began on October 18. The bill has been introduced in both bodies of the legislature and is now going through the committee process. ACES would amend the Petroleum Production Tax (PPT) that was passed in special session in 2006. Among other things, the bill as introduced provides for an increased production tax rate, amends the current progressivity factor and would provide the Department of Revenue with increased authority to collect certain information from producers.

Point Thomson Oil and Gas Unit

AAGs Richard Todd and Jonathan Katchen are representing the Department of Natural Resources (DNR) in appeals of its decision to terminate leases at the Point Thomson Unit. The leaseholders filed seven appeals to the superior court. Judge Sharon Gleason heard final oral argument on the seven appeals on October 5. This means superior court proceedings on the appeals were essentially complete in less than a

year from the issuance of the DNR decisions. Exxon also filed a claim for original damage, which was dismissed by the superior court. Exxon appealed the dismissal to the Supreme Court and Exxon's opening brief is due November 5, 2007.

Opinions, Appeals and Ethics

The section continues to provide ethics training for the executive branch agencies and some boards and commissions. In October, eight sessions were held. Also in October, the section completed and posted on the Department of Law's website a self-guided ethics training tool. The training tool is a PowerPoint presentation with graphics and sound effects, and is designed to help an individual learn about the requirements of the Executive Branch Ethics Act by running through the presentation on a computer. The presentation can be accessed at the ethics web page:

<http://www.law.state.ak.us/doclibrary/ethics.html>

The section also continued their efforts with the Division of Personnel to design other ethics training programs and continued work on a manual for designated ethics supervisors.

During the month, three new complaints or reports were received requiring investigation; one investigation was closed and one advisory opinion was issued. The section also responded to numerous email and oral requests for ethics advice.

Appeals/Litigation

AAG Mary Lundquist completed the briefing in the Alaska Supreme Court in *RM and KM v. State, OCS*. This is an appeal from the denial of RM and KM's petition to adopt a foster child. At the same time that the superior court denied the foster parents' adoption petition, the court placed the foster child (in an ongoing CINA case) in the home of a family friend in Florida in accordance with the CINA placement preferences.

The foster parents contend that the superior court found that their adoption of the foster child would be in the child's best interests and that since the court found that the state unreasonably withheld its consent, the adoption petition should have been granted. The state cross appealed on the issue of whether the superior court erred in finding that OCS unreasonably withheld its consent to the foster parents' adoption petition. It is the state's primary position that OCS reasonably withheld its consent because, under the CINA statutes, the birth parents have the retained right to consent to an adoption and the mother did not consent to the adoption.

Further, the state argued that under the CINA statutes, OCS does not have authority to consent to the adoption of a foster child until there is a termination of the parental rights (which had not yet occurred). Even if the state did have a right to consent, OCS reasonably withheld its consent to the adoption given its determination that the child should be placed in the ongoing CINA case with the family friend. Oral argument will be held in December.

AAG Joanne Grace filed a brief on behalf of the Office of Public Advocacy in a custody case. The indigent mother in the case asked the court for an appointed attorney to assist her in the litigation. The father had private counsel, but was not financially able to pay for the mother's representation. The court held that the mother had a due process right to be represented by counsel, at least in this case, where the mother faced possibly losing custody of her child. The court also found that OPA's enabling act violates equal protection because it provides that OPA may represent an indigent parent when the other parent is represented by a public agency, but does not authorize OPA to provide counsel when the other parent is represented by private counsel.

After the court issued this order, the Alaska Court System intervened and argued that the court should sever from the OPA enabling act, the language limiting OPA representation in

custody cases to those litigants whose opponents are represented by a public agency. The OPA brief argued that the statute does not violate equal protection, and that if the court expands the functions and duties of OPA, it would violate the separation of powers doctrine.

Regulatory Affairs and Public Advocacy

Stipulated Settlement

U-06-138/139, AWWU rate case. Anchorage Water & Wastewater Utility (AWWU) filed its third successive rate case (in as many years) in 2006 seeking a 14.5% increase in water rates and a 13% increase in wastewater rates. The Attorney General/RAPA elected to participate in the case and promptly filed a motion for summary disposition on two issues regarding rate base calculation and rate case expense. As a result of the commission granting the Attorney General's motion, the utility's revenue requirement was reduced by \$2.1 million.

Prior to the scheduled October 29 hearing, the parties filed a stipulated agreement which settles all remaining issues in the instant case, except the outstanding (and recurring) MUSA issue which has been further appealed by the utility to the Alaska Supreme Court from the RCA decision in a prior rate case. If the commission approves the proposed settlement in the instant docket, the utility's proposed 14.5% water rate increase will be reduced to 7% and the proposed 13% wastewater rate increase will be held to 9.5%.

New Cases

U-07-112, BUC electric rate case. Bethel Utilities Corporation (BUC) filed a rate case seeking a 9.81% across the board increase in electrical rates. BUC's last rate case was completed in 2004, at which time the Commission approved a stipulated settlement filed by the utility and the Attorney General/RAPA [U-03-11(12)].

In response to RCA invitation, the Attorney General elected to participate in the instant case on October 10. Attorney General comments filed during the public notice period identified numerous issues which warrant examination to determine if BUC's proposed revenue requirement and rates are reasonable, including discontinuation of waste heat sales, projected debt expense and rate case expenses, and pro forma air emissions fees and wage increases. A procedural schedule has not yet been set.

U-07-134, NSB refuse rate case. The North Slope Borough (NSB) provides commercial container refuse service to the Prudhoe Bay oilfield service area, Service Area 10. The utility filed a rate case based upon an asserted 50% revenue requirement deficiency. The proposed rate increases for basic pickup service ranges from +11% for unscheduled large bin to +150% for scheduled small bin.

In response to commission invitation, the Attorney General elected to participate in the case on 10/15/07. Preliminary review identified several issues which warrant examination, including the utility's numerous affiliated transactions, the proposed return on equity, and contact service costs and related allocations. A procedural schedule has not yet been set.

U-07-38/U-07-116, CVTC local telephone service rate modification. Copper Valley Telephone Company (CVTC) anticipates local exchange competition from GCI within its service area (which includes the communities of Chitina, Glennallen, McCarthy, Mentasta, Tatlikek and Valdez). In Docket U-07-38, CVTC filed a revenue requirement study for the stated purpose of using it in support of a rate modification request under 3AAC 53.245. (CVTA also filed a related depreciation study in U-07-26).

In Docket U-07-116, CVTC filed a petition for modification of its Universal Service (monetary) Support disaggregation plan. At the same time (September 2007), CVTC filed TA 80-11 to implement competitive entry rate modifications

(pricing flexibility) to its rates in order to respond to GCI's prospective entry into the Valdez exchange.

The related dockets/filings involve matters of first impression regarding implementation of new commission regulations designed to allow an historical monopoly telephone provider to selectively adjust cost-based/regulated rates to meet competitive entry into some parts of its service area. There are potential, severe rate shock implications for those rural exchanges which will remain non-competitive and under monopoly provision of telecommunications services. In response to commission invitation, the Attorney General/RAPA elected to participate in the related dockets on October 17. Procedural issues regarding necessary coordination of the related dockets are presently being addressed.

Torts and Workers' Compensation

The federal court dismissed all of pro se inmate Bret Bodner's claims against the Department of Corrections with prejudice. Bodner asserted that he was injured while working in a DOC facility and asserted claims under 42 U.S.C. 1983. His claims, filed in federal court, suffered fatal jurisdictional and Eleventh Amendment immunity problems. The federal court gave him several opportunities to amend his complaint to allege a colorable claim. When he failed to do so, the case was dismissed by Judge Timothy Burgess.

Transportation

Dispute over Juneau Access Administrative Record Resolved

Environmental groups challenging the Federal Highways Administration's (FHWA) environmental impact statement and record of decision sought to expand the FHWA's administrative record. The FHWA opposed the addition of documents to the official administrative record. The state, as

intervenor, urged the U.S. District Court to accept certain documents into the record in order to curtail further procedural argument, so the parties could move on to substantive briefing of the issues. The state opposed an open-ended expansion of the record. The court adopted the state's view. AAG Peter Putzier represented the state.

CRIMINAL DIVISION

Anchorage DAO

Anchorage presented 82 grand juries and seven trials in October. Of note, ADA Alan Goodwin secured the conviction of Glen Cooper on several counts of third-degree assault for intentional driving at police officers. Officers had tapped on Cooper's window to do a welfare check as he appeared passed out behind the wheel of his idling car. When Cooper drove at the officers, one of the officers shot him. Cooper sued the police officer and defended his criminal case by alleging that the DA's office was covering for a rogue officer. Sentencing is set for December.

The grand jury indicted Elmer Seetot for murder. Seetot had bashed his friend Terry Jackson with a frying pan and then cut his body into pieces to put into the family freezer. ADA Gustaf Olson presented the case.

Bethel DAO

Attorney General Colberg was in Bethel and attended the VPSO taskforce meeting on October 5-6. Also attending the meeting were state senators, Department of Public Safety personnel and an Association of Village Council Presidents representative. The taskforce conducted public hearings in Bethel then traveled to Emmonak and Mountain Village before returning to Anchorage.

The Domestic Violence and Sexual Assault Task Force was also in town October 5. This task

force conducted a public hearing in an effort to collect information regarding issues of sexual assault and domestic violence in the Y-K Delta.

ADA Patty Burley was busy in misdemeanor trials during the month. ADA Tom Jamgochian was second chairing misdemeanor trials in an advisory role and was also in felony trial himself during October. ADA A.J. Barkis was in drug and alcohol misdemeanor trials before leaving for a couple of weeks. Paralegal Jody Lown came to Bethel to help out since the offices have been short one-third of their paralegal staff for a few months.

Attorney case assignments were modified in an effort to improve prosecution of village cases. Each village court in Emmonak, Chevak, St. Mary's, McGrath and Aniak has been assigned an individual attorney.

Aaron Thomas changed his plea to guilty on one count of murder in the second degree for the murder of Nellie Frank.

Jonathon Kashatok was charged with murder in the second degree in the beating death of his wife Angelina Hapoff.

Kenneth Morgan, Jr, changed his plea to guilty on two counts criminally negligent homicide for the deaths of two girls.

A male, Kay Attie, was indicted on 22 counts of SAM involving seven young male victims. Judge Hamilton sentenced William Roehl, who was convicted at trial of assault in the third degree, domestic violence and three aggravators were proven. Hamilton sentenced Roehl to 24 months with 19 months suspended after conviction at trial. ADA Tom Jamgochian was the prosecutor.

Fairbanks DAO

September and October were busy as usual.

September saw 101 felony referrals with nearly one-half being property crimes. The September Grand Jury returned 40 indictments.

Three individuals were indicted for kidnapping and robbery in connection with a robbery at the local Gottschalk's Department Store. The robbery netted approximately \$8,000, but the three were caught after one of the three was contacted as a suspect and gave up the other two culprits. The trio was armed with semi-automatic rifles.

On a lighter note, the grand jury also considered the case of the intoxicated drivers who had a better idea. The two friends were drinking and driving in the newly purchased used vehicle of one of the pair. Due to their inebriated state, the small SUV became stuck in mud on the edge of a slough. The pair tried to push the vehicle out without success. Then they got a better idea; they both professed to know how to operate heavy equipment and remembered seeing some a few hundred yards away.

The intrepid pair tried a couple of pieces of equipment and got one Cat excavator to run. The pair then drove the now stolen Cat to the slough. They were able to get the car out of the mud; unfortunately they managed to get the Cat stuck in the slough causing in excess of \$12,000 in damage to the Cat. The pair also managed to destroy the back window and rear portion of the roof of the car. The investigation was aided by the military identification card one of the pair dropped at the scene.

The misdemeanor case load for September was busy too. The unit had 381 new referrals with 92 new DUI's. The number of trials slowed a bit in September on the misdemeanor side.

On the first day of October, the office said goodbye to ADA Jason Gazewood. However, he went out in style by getting Byron Geisinger a composite sentence of 18 years with two years suspended for manslaughter, failure to render aid, and assault in the first degree.

On the same day that ADA Gazewood left, ADA Dave Carlson started with the office. On October 3, he took his first verdict of guilty in his first DUI trial.

As of October 25, 2007, the grand jury returned 26 indictments. Among the indictments were two notable DUI defendants. One of the defendants stated when he was informed he was under arrest for felony DUI that he would do his five years and continue the drink and drive. He was indicted under both theories of felony DUI: two prior convictions within the past ten years and a felony within the past ten years. His three priors in the State of Alaska are all for felony DUI.

The other individual refused to provide a breath sample, but the grand jury heard that he was so drunk that while sitting passed out in his vehicle, he had bowel control problems. The grand jury did not hear that his preliminary breath test (PBT) result was 0.403.

Referrals to the misdemeanor unit have been down a little this month. Through October 24, 2007, only 54 new DUI's were referred. A total of 190 misdemeanors were referred through October 24. The respite has allowed the misdemeanor unit to catch up on their motion work.

Juneau DAO

A highlight in Juneau this month was a court trial where Judge Patricia Collins found Leroy Jacobs guilty of assault in the second degree for slashing R.M.'s face with a knife on July 4, 2007. After the fireworks, both men were down at the cruise ship dock. Jacobs said something to R.M. and his friends and R.M. told the defendant to stop. Shortly after, Jacobs approached R.M. and slashed him across the right side of his face, creating a gash that ran from R.M.'s ear to the corner of his mouth. R.M. did not know Jacobs and was unable to remember exactly what was said due to intoxication and trauma from the incident. R.M. then chased Jacobs into the core of downtown, running into several officers on foot patrol during bar break. Upon notification by R.M., the officers apprehended Jacobs and

located the knife in a sheath on the defendant's belt. The knife still contained the victim's blood.

Demanding a court trial, Jacobs took the stand and admitted that he had advanced on R.M. without provocation and had taken the first move, and was the first one to "draw blood." The defense tried to maintain a self defense case despite the client's testimony. Jacobs is presumptive three and faces a sentence of six to ten years. He is scheduled for sentencing December 3, 2007.

In October, six drug dealers were indicted on various misconduct involving a controlled substance II, III, and IV charges, removing approximately \$50,000 drug profit from the streets. There were also several DUI arrests for both alcohol consumption and controlled substance abuse.

Kenai DAO

Three new judges joined the Kenai bench: Carl Bauman took over Judge Brown's seat as a superior court judge, former Fairbanks ADA Matt Christian took over the Kenai Magistrate position that Sharon Illsley had before becoming a district court judge, and Jennifer Wells took a year-long appointment as a district court judge.

Homer has been the scene of most of the office's trials this month. ADA Devoron Hill secured guilty verdicts in a misdemeanor DUI/refusal trial. The defense was subsequent consent to the refusal. The jury didn't buy it for a second, almost literally. They were out only a matter of minutes.

ADA Kelly Lawson's jury hung on a misdemeanor boating collision case. The trooper, who is a brown shirt, charged only the driving and not the felony assault warranted by the injuries. In addition, the tooper set the arraignment out two months, so by the time the prosecutor got the case, there were only six weeks left on Rule 45. With the jury hung, the

prosecutor can remedy the charging and the timing.

The more frustrating case was ADA Jean Seaton's. She had a felony DUI trial at which all the evidence was presented, the alternate was excused, and the jury was going into deliberations when one of the jurors sent a note to the judge. The juror then advised the parties that she had had prior contact with the defendant and had decided from that contact that the defendant's behavior was not the result of impairment—just the result of being weird. Her plan was to share this information with the other jurors, thereby assuring an acquittal, until something in the jury instructions made her decide that this was wrong. She was of course excused. Unfortunately the alternate was not able to be called back in because he had talked to the officer after being excused, and the defendant refused to agree to an 11-person jury.

The grand jury kept busy with felony DUIs, assaults, drug cases, and felons in possession; some cases having a combination of several of these categories.

In a road rage case, the defendant, who had a juvenile adjudication for a particularly vicious assault in the second degree, pulled a gun on a driver who was upset because the defendant had cut him off. The defendant then gave the gun to his passenger and told her to run to his house, grab up his other guns (which were four in total), and hide them, thus earning himself a tampering charge as well as the assault and misconduct weapons charges.

Kodiak DAO

Kodiak was reasonably quiet during the month of October. OSPA Rural Prosecutions AAG Gregg Olson filled in during the first days of October to permit DA Wallace's travel to Bethel as part of the legislative task force on the Council on Domestic Violence and Sexual Assault. AAG

Olson's presence in the office was greatly appreciated.

Early in the month a Kodiak man was indicted for vehicle theft and arson after taking a 2007 truck from the parking lot of the local hospital and setting the vehicle on fire after driving it around. The owner, at the hospital attending the birth of his first child, accidentally left his keys in his truck.

A Port Lions man was charged with escape after leaving custody in the village following his arrest for a domestic violence assault. When finally located by troopers in the village, the chain joining the handcuffs was cut but the defendant was still wearing one cuff on each wrist.

Nome DAO

On October 13, in Teller, Alaska, Rudy Pushruk returned home from a night of drinking to find Eli Dickson, his girlfriend's one-armed ex-boyfriend, sleeping on his bedroom floor. Pushruk repeatedly kicked Dickson in the face, breaking Dickson's dentures and causing bruises and bleeding. Pushruk then left his home.

Dickson stayed on the floor until others in the house showed him the door. Outside, Dickson saw Pushruk on the next-door neighbors' steps smoking a cigarette. Dickson approached Pushruk, pulled him to the ground and then started kicking him on the head and neck. Dickson kicked and stomped Pushruk until the bones of his face and skull were crushed. Pushruk died soon after.

A Nome grand jury indicted Dickson on two theories of second-degree murder and for manslaughter. Trial will be next year.

Palmer DAO

Trials

A Palmer jury convicted Nolan Moore of robbery in the first degree and assault in the third degree for robbing a Tesoro station clerk at knifepoint. The robbery was caught on video, and Moore was stopped two blocks from the gas station with money taken from the till in his pant leg. Defense arguments that the defendant was too intoxicated to form the requisite intent did not persuade the jury. The trial prosecutor was ADA Alison Collins.

Todd Crist was convicted, after only one hour of jury deliberation, of sexual assault in the first degree, assault in the third degree and assault in the fourth degree for an incident where he held his girlfriend captive for four to five hours, raped her, and threatened to kill her. In an interview with AST investigators after the crime, Crist admitted scaring the victim and claimed they had consensual sex. Crist's two ex-wives testified during the trial concerning prior domestic abuse and his controlling behavior. His sentencing is scheduled for January 2, 2008, and he faces 20 to 99 years in prison. ADA Rachel Gernat prosecuted this case for the state.

Nineteen-year-old Jason Thompson was convicted by jury of sexual abuse of a minor in the second degree for having a sexual relationship with a 13-year-old girl. The jury also found him guilty of unlawful contact and violating conditions of release for calling the victim and writing letters to her while the case was pending. Despite arguments by the prosecutor for a harsher sentence, the trial judge sentenced Thompson on the sexual abuse charge to 5 1/2 years, with 3 years suspended, 10 years of probation and 15-year sex offender registration, finding that the case was "least serious" and that Thompson acted like any other 18-year-old "teenager." The trial judge gave him ten additional days in jail for violating conditions of release, but did not impose any additional time to serve on the

unlawful contact charges. The prosecutor was ADA Rachel Gernat.

Bradley Howe was convicted after a bench trial of felony DUI, felony eluding and reckless driving. The case involved an incident in 2006, where Howe was riding a four-wheeler and led the Wasilla police on a chase. During the pursuit on a roadway, Howe illegally passed a truck on a curve, ran through a stop sign, flipped his four-wheeler and fled into the woods. Officer Wysocki ran after Howe and quickly apprehended him. ADA Mike Perry handled this case.

Motions/Evidentiary Hearings

The state defeated defense challenges to searches in the following drug cases: *State v. Kenneth Baker*, *State v. Gerald McGowen*, *State v. Brian Shook*, and *State v. Michael Hamilton*. The prosecutor was Suzanne Powell.

After a four hour evidentiary hearing, Judge John Wolfe dismissed a DUI case against Andrew Abyo, ruling that the officer did not have probable cause to arrest Abyo. A jury convicted Abyo of DUI in 2005 after 17 minutes of deliberation, despite some significant errors in the officer's trial testimony, which she had to correct on the witness stand. Abyo appealed, and oral arguments were presented to the Court of Appeals. The Court of Appeals remanded the case on the issue of probable cause to arrest. Despite the final outcome in the Palmer district court, the Court of Appeals ruled in *Abyo v. State*, that defendants do not have a right under *Crawford v. Washington*, 541 US 36 (2004), to cross-examine the authors of Datamaster verification of calibration documents. A different ruling on this issue would have impeded DUI prosecutions in Alaska. ADA Rick Allen was the trial and appellate prosecutor.

Pleas

Mark Dunder pled to one consolidated count of sexual abuse of a minor in the first degree,

sexual abuse of a minor in the second degree, with an agreement that his total sentence will be 36 years, with 9 years suspended (27 years to serve) and a requirement to register as a sex offender for the rest of his life. Dunder sexually abused his daughter and the daughter's friend, took photographs of the victims and downloaded thousands of images of child pornography. Dunder is held without bail until his sentencing in March. ADA Rachel Gernat prosecuted this case.

Sentencings

Lyle Kackman, age 75, was sentenced to 15 years, with 8 years suspended, 10 years probation and sex offender registration on two counts of sexual abuse of a minor in the second degree involving five child victims. The prosecutor was ADA Rachel Gernat.

SAVE THE DATE

November 27-30 -	NAAG Winter Meeting Park City, Utah
December 20 -	Juneau Holiday Party